Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO.

ED SALAZAR,

Petitioner

VS.

DAN MORALES, Attorney General,

Respondent

PEITITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS FOR REVIEW

Whether the firing of an Assistant Attorney General because in the course of his official duties he offended powerful political interests was a deprivation of his civil rights.

Assuming he was fired for a corrupt reason:

1. Were the pleadings and investigatory letters he drafted protected speech as defined in *Connick v. Myers* 461 U.S. 138 (1983)?

2. Did he have a liberty interest in adhering to his oath as an attorney representing the people of Texas?

3. Did the fact that his immediate supervisors encouraged his activities against the powerful political interests create an expectation of continued employment?

4. Did the fact that he associated with a former Texas Attorney General and that this association contributed to his firing violate his right to freedom of association?

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CITATIONS OF OPINIONS BELOW

Neither opinion was published. The Fifth Circuit Court cause number is 96-50114. The District Court cause number is A-95-CA-743 SS.

STATEMENT OF JURISDICTION

The Fifth Circuit opinion and judgment was filed on October 2, 1996.

This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

STATUTES

42 U.S.C. §1983.

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Plaintiff, a former Assistant Attorney General for the State of Texas filed an action against Dan Morales, Attorney General of the State of Texas, alleging that Morales deprived the Plaintiff of his Civil Rights under color of law in violation of 42 U.S.C. 1983. Defendant filed a motion to dismiss which was granted by the District Court for failure to state a claim. Appeal was taken to the United Stated Court of Appeals for the 5th Circuit which affirmed the actions of the District Court.

STATEMENT OF FACTS

The facts as pled by Plaintiff, which, for purposes of a motion to dismiss, must be accepted as true are as follows.

For over ten years prior to the incidents in question, Plaintiff Salazar had served as an Assistant Attorney General under three different Attorneys General. In the months immediately preceding the events which led to these causes of

action, Salazar was employed with the Insurance Fraud Section of the Consumer Protection Division of The Texas Attorney General's Office.

On a number of occasions while Salazar was with this section, his boss, Joe Crews had a number of conversations with the Defendant Morales, Gay Erwin a high ranking administrator and Tim Conger, another high ranking administrator wherein Salazar's loyalty to the "Morales Team" was questioned. Ms. Erwin's remarks and questioning were specifically directed toward whether Salazar and his ex-wife were working for former Attorney General Jim Mattox in his campaign for U.S. Senate.

Among the matters upon which Salazar was working was an investigation into the premiums charged by various insurance companies in connection with their insuring personal and commercial property. The investigation led Salazar and his immediate superiors to believe that certain insurance companies,

including Allstate, State Farm and Texas Farm Bureau Insurance Companies, were overcharging their policyholders. The gist of the matter was that the companies were charging the same or higher premiums for insuring property which was depreciating in value. Therefore, while the amount of money that the companies would have to pay to the policyholders in case of a loss declined, there was no comparable decline in the premiums charged.

On or about October 8, 1993, with the approval and at the instruction of his supervisors, Salazar filed three separate lawsuits against State Farm, Allstate and Texas Farm Bureau Insurance Companies and their various subsidiaries. On or about that date, Defendant Morales issued a press release announcing the institution of the lawsuits and praising the work of the Texas Attorney General's Office in protecting insurance consumers in Texas.

The following week, after the lawsuit had been filed,

Salazar's boss, Joe Crews was called to the office of Tim Conger. Conger expressed dismay about the suit against Texas Farm Bureau being filed and told Crews that he had spent a lot of time developing a good relationship between Attorney General Morales and the Texas Farm Bureau. Conger stated that filing the lawsuit without advance notice to the Farm Bureau (which is a powerful political player in Texas state politics), would jeopardize that relationship.

Shortly after the meeting between Crews and Conger, Crews began to pressure Salazar to settle or end the lawsuit against Texas Farm Bureau Insurance Company. Salazar had filed the suit at the insistence of Crews, and had been involved in some favorable negotiations with the attorney for Texas Farm Bureau Insurance Companies. However, these negotiations began to go badly. Soon thereafter, Crews told Salazar to end the case immediately. Salazar protested that dismissing the case against Texas Farm Bureau might compromise the cases against

the other insurance companies.

In the days around November 22, 1993 the matter came to a head. Salazar received a communication from Crews instructing him to dismiss the lawsuit against Texas Farm Bureau Insurance Companies. Salazar informed Crews that it would be unethical and possibly even illegal to dismiss the case against one insurance company while continuing the suits against the other two insurance companies who were doing the same thing as Texas Farm Bureau Insurance Companies. On the same day, Salazar received a memorandum from Crews (which had apparently been written a few days earlier) informing him that he should look for another job.

Also, during the fall of 1993, Plaintiff was working on a number of cases and investigations involving the sale of credit life insurance by various retail establishments. Plaintiff and his supervisors determined that a number of furniture stores and automobile dealers were selling credit life insurance to persons

who bought furniture and automobiles on time. It appeared that these retail establishments were receiving commissions from the insurance companies for selling the credit life insurance, even though the retail establishments did not have insurance licenses.

Plaintiff had filed two suits against furniture stores who were guilty of this practice. However, the owner of one of the furniture stores was a friend and contributor to Defendant Dan Morales and came to Morales' office to protest the lawsuit. After the meeting, Plaintiff was told to dismiss the suits. After discussions with his supervisors, Plaintiff was allowed to continue actions against the insurance companies but had to dismiss the suits against the furniture stores.

In the case of the automobile dealers, Plaintiff had prepared civil investigative demand letters to be sent to various automobile dealers requesting information as to their practices concerning credit life insurance. This was done with the knowledge of his supervisors, who were in fact urging him on.

However, shortly into the investigation against the automobile dealers, Plaintiff's boss, Joe Crews, was summoned to a meeting in Defendant Morales' office. Present were Morales, Gay Erwin, Tim Conger, Crews and Gene Fondren, among others. Gene Fondren is the longtime lobbyist for the Texas Automobile Dealer's Association. He has had powerful political influence in the State of Texas for many years. Although he was neither the lawyer for the dealers being investigated, nor was he a party, he demanded to know what was going on in the litigation and complained that he was getting a different story from high ranking administration officials as opposed to the lawyers who were actually dealing with the cases. Crews was somewhat shocked at the effrontery of this demand but also noted that Morales did not seem to be offended by the behavior. After the meeting's conclusion, Gay Erwin walked Fondren out of the office and returned shortly to tell Morales and the others that Fondren was upset with the

Plaintiff, Ed Salazar. She then made remarks to the effect of "Why hasn't Salazar been fired?" Crews then stated, in front of the Defendant Morales, that he would take care of the matter, meaning that he would fire Salazar. Shortly thereafter, he did, as stated above.

During the weeks following Salazar's termination, a number of other attorneys with the Consumer Protection Division were summarily dismissed. This attracted the attention of various reporters who contacted Salazar and the other attorneys who had been dismissed. In response to the questions of why he had been dismissed, Salazar related to the reporters the situation involving the suit against Texas Farm Bureau Insurance Companies, the suit against the furniture stores and the situation with the automobile dealers. Several newspapers carried stories about this, and on or about February 3, 1994, a reporter with the Associated Press's Houston office asked Dan Morales about Salazar's termination and the reasons why he was

terminated. In response, Defendant Dan Morales characterized Salazar as a disgruntled employee who was not doing a good job. In at least two newspapers Morales was quoted as saying:

"This particular lawsuit was one not authorized and not merited. He went out and filed it without authority from his supervisors. We just don't do things like that in our agency. We're going to continue to make decisions in a similar fashion in the future. When lawyers mess up in our agency there will be consequences. It's as simple as that."

ARGUMENT

The District Court based its dismissal on the fact that Defendant Morales (at least to Plaintiff's knowledge) did not openly direct that Plaintiff be fired, but rather, sat by while his subordinates discussed the firing and the reasons for the firing. (Appendix pp. A-6,7)

The Court of Appeals apparently disagreed with the District Court's basis for dismissal and assumed that the

Plaintiff's complaint could be construed as supporting a "supervisory liability theory. . ." (Appendix pp.A-1,2) The Court of Appeals affirmed the dismissal because in its judgment, Plaintiff had not pled a deprivation of Civil Rights. Plaintiff, of course, believes that he pled the deprivation of at least four Civil Rights as follows.

Freedom of Speech

The Court of Appeals interpreted *Connick v. Myers* 461 U.S. 138 (1983) as requiring that the dismissed public employee must show that the speech for which he was punished was that of "a private citizen upon matters of public concern." (Appendix p. A-2) *Connick* made no such requirement. In fact, the opinion speaks of

> "a balance between the interests of the [employee], as a citizen in commenting upon matters of public concern and the interests of the state as an employer in promoting the efficiency of the public services it performs through its employees."

461 U.S. at 140. This Court clearly held that the Assistant D.

A. in *Connick* was speaking on matters of public concern when she circulated a questionnaire to the other assistants inquiring whether or not they had been pressured to participate in political activities. She was not speaking as a private citizen.

This Court was concerned with the balancing between the right of an employee to speak on matters of public concern and the efficient operation of the D.A.'s office. In the present case there is no question that the Plaintiffs pleadings against the insurance company and furniture store and his investigative letters to the automobile dealers touched upon matters of public concern. As for efficiency, the pleadings and letters were, at the time they were written, in line with the wishes of Plaintiff's immediate superiors, and in fact, the pleadings against the insurance companies were praised by the Defendant. Everything that Plaintiff did was in furtherence of directives given him by his immediate superiors. Nothing that he did was critical of the Defendant's management of the Office of the Attorney General,

so there is nothing from the standpoint of the efficient running of the office to balance against Plaintiff's right of free expression.

Almost all of the cases involving public employees and free speech have been instances where the employee was critical of the employer or of the political position taken by the employer. This case involves neither. The issue here is whether a public employee's official speech which offends parties outside the public agency can be the basis for termination of the employee. Plaintiff recognizes that powerful political forces can and do shape the actions of public agencies. This petition is not a request for the Court to put an end to such influence, merely a request to protect the innocent public employee whose speech draws the wrath of the outside interests and the change of heart of his superior.

Liberty Interest

Plaintiff had more than just an allegiance to his

employer. Plaintiff was and is an attorney and, when he filed his pleadings and his investigative letters he was acting as attorney for the people of Texas, not for the Defendant. Certainly, the Defendant had a right to supervise Plaintiff which would include the right to determine tactics and even the targets of law suits. But the Defendant's action in this case had nothing to do with the technical aspects of lawyering or even the policy questions of when and who to sue. Rather, this is a case wherein the Defendant sold out the interests of the client for personal political gain. In doing so, the Defendant interfered with Plaintiffs oath taken upon admission to the bar to represent his client fairly and zealously.

Expectation of Continued Employment

The Plaintiff was clearly an employee at will and does not contest that. Plaintiff does contend that he was encouraged to take the actions that he took by his immediate superiors. Plaintiff was placed in the situation of a police officer who is

ordered by his captain to raid a house of prostitution except that when the officer breaks down the door, there is a friend of the police chief. Shouldn't the fact that the Plaintiff and the analogous police officer were told to take certain actions be considered the creation of a contract that if the action were taken in good faith, there would be no consequences?

Freedom of Association

The Court of Appeals stated that there was no allegation that there was a political rivalry between Defendant and the former Attorney General with whom Plaintiff associated. An association may be political, religious, personal, business, sexual or whatever. Our Constitution grants us the right to make these associations and, in most instances, forbids government retaliation.

CONCLUSION - WHY THIS CASE IS IMPORTANT

The importance of this case is that we are not talking about protecting a public employee from bad or misguided

management. We are talking about corruption.

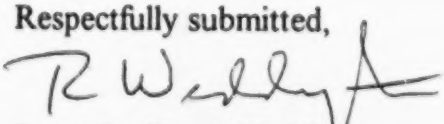
These days, it is rare to find instances of *quid pro quo* bribery in connection with public offices, but we still have the corrupting influence of political favors and contributions which hinder the work of government. We always will, but this Court can slow the pace of corruption by giving innocent public employees some protection from the influence of political favor and contributions.

In this case, an insurance company got away with charging illegal premiums and a furniture store and who knows how many automobile dealers have gotten away with violations of the insurance code and gouging customers by selling almost worthless credit life policies. The Plaintiff was hot on their trail but he was called off by the Defendant Dan Morales, so that Morales could curry favor with the Farm Bureau, his friend who owned the furniture store and the Automobile Dealers Association and it's lobbyist.

This Court should protect the honest public employee from these types of influence, especially lawyers and policemen who are doing investigative work. This Court can do that within the framework of *Connick vs. Myers* and all of the other Supreme Court cases cited therein and decided since.

A public employee does not have a right to a job, no matter how well he does it. We are not asking for that. We are merely asking that the public employee have a right to be free of corrupt influences which deprive the employee of his right to speech, association, liberty and the expectation that if he correctly identifies those who are breaking the law, the lawbreakers will not have the ability to subvert his work through corrupt means.

Respectfully submitted,



James R. (Ron) Weddington
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50114 [FILED
Summary Calendar OCT 02, 1996]

ED SALAZAR,

Plaintiff-Appellant,

versus

DAN MORALES, Attorney General

Defendant-Appellee.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. A-95-CV-743

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Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM.*

Plaintiff Appellant Ed Salazar appeals the dismissal of his Section 1983 complaint against Defendant-Appellee, Dan Morales. Assuming that the facts of Salazar's complaint could be

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* Pusuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

construed as supporting a supervisory liability theory, the dismissal was nonetheless warranted as Salazar has pleaded no facts showing constitutional injury. Accordingly, we affirm on this ground. See Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Circ. 1981).

The pleadings, letters, and other communications he relies upon as constitutionally protected speech were produced in his role as assistant attorney general; they do not constitute the speech of a private citizen upon matters of public concern. See Connick v. Myers, 461 U.S. 138, 147 (1983). Salazar's free association claim fails since he alleged no current political rivalry between Morales and former attorney general Mattox. See Correa v. Fischer, 982 F.2d 935, 933 (5th Cir. 1993). Salazar cannot claim he was denied a liberty interest as his complaint does not allege defamation. Mere discharge, without specific defamatory charges, will not implicate a liberty interest. Rosenstein v. Dallas, 876 F.2d 392, 396 n.3 (5th Cir. 1989),

reinstated in pertinent part, 901 F.2d 61 (5th Cir. 1990) (en banc), cert. denied, 498 U.S. 855 (1990). Finally, Salazar cannot assert a property interest as the personnel policies of the attorney general's office state that an assistant attorney general serves at the pleasure of the Attorney General and that the personnel policies do not create a property right. Absent state law, contract, or personnel policies conveying an expectation of continued employment, no such expectation is conveyed by the Constitution itself. Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ED SALAZAR	§	
	§	
	§	
VS.	§	**NO. A 95 CA 743 SS**
	§	
	§	
DAN MORALES	§	

ORDER

Before the Court are Defendant's Motion to Dismiss for failure to state a claim upon which relief may be granted and Plaintiff's response in opposition to the motion to dismiss. Plaintiff filed this civil action against Defendant Morales, individually, pursuant to 42 U.S.C. § 1983, alleging violations of Plaintiff's rights under the United States Constitution and the Texas Constitution.[1] The suit is based upon the termination of Plaintiff's employment with the Office of the Attorney General

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1 Plaintiff apparently has conceded he cannot state a claim for violations of the Texas Constitution in light of *City of Boullion*, 896 S. W.2d 143 (Tex. 1995). These claims will be dismissed.

for the State of Texas.

Plaintiff asserts Defendant violated his (1) right to freedom of speech, (2) right to freedom of association, (3) "liberty interest in being able to abide by his oath as an Assistant Attorney General," and (4) property interest in his job. He alleges he was terminated on account of his political affiliation with former Texas Attorney General Jim Mattox and for filing suit against politically influential interests in the state. By his complaint, Plaintiff admits that he was terminated by his supervisor, Joe Crews, but attempts to infer the action was taken at the direction of Defendant Morales.

The initial question for the Court is whether Plaintiff has presented sufficient allegations of Defendant Morales' personal involvement in his termination to support a section 1983 action against him. *See generally, Douthit v. Jones,* 641 F.2d 345, 346, (5th Cir. 1981). Despite peppering his response with statements that his claims against Morales are "obvious" and that "there is

no question" Plaintiff was fired from improper reasons, the only facts alleged regarding Defendant Morales involvement are: (1) at some point prior to Plaintiff's termination, a member of Morales' staff, in Morales' presence, inquired about Plaintiff's loyalty to the "Morales Team"; and (2) immediately prior to the termination, in Morales' presence, when asked when Plaintiff would be fired, Crews stated he would "take care of the matter." Crews statement was allegedly in response to a question from Gay Erwin, not a request by Morales. There is no allegation that Crews stated the reasons he would terminate Plaintiff or that Morales instructed him to do so. Plaintiff, resorting to movie analogies, insists this "action" by Morales is sufficient to state a claim under 42 U.S.C. § 1983 against Morales for his termination.

Plaintiff fails to allege any direct action by Defendant Morales in connection with his termination. Instead, he relies solely on what he believes are "obvious" inferences that Morales

must have directed the termination, and done so for improper reasons, because of Crews statements in front of Morales. These allegations simply are not sufficient to state a section 1983 claim against Defendant Morales individually, when Plaintiff readily admits he was terminated by Crews. The Court finds the complaint alleges nothing more that Morales right to control Crews "without any control or direction being having been exercised" and without any allegations of failure to supervise. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 n.6 (5th Cir. 1994) (quoting *Monell v. New York City Dept. of Social Services*, 98 S. Ct. 2018, 2037 n. 58 (1978)). consequently, under the law of this Circuit, Plaintiff has failed to state a claim against Defendant Morales, individually, pursuant to 42 U.S.C. § 1983.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Defendant's Motion to Dismiss [#3] is GRANTED; and

IT IS FURTHER ORDERED that all causes of action asserted by Plaintiff Ed Salazar against Defendant Dan Morales in this civil action are hereby DISMISSED and costs are assessed against the Plaintiff, for which let execution issue.

SIGNED on this 4th day of January 1996.

(Signature) Sam Sparks
UNITED STATES DISTRICT JUDGE